No. 91-676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN W. GUMBY, SR., et al.,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., MCDERMOTT INC., U.E. & C.-CATALYTIC, INC., BURNS & ROE ENTERPRISES, INC., AND DRESSER INDUSTRIES INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Did Congress intend, in 28 U.S.C. § 1447(d), to make federal district courts final arbiters of the constitutionality of federal jurisdictional statutes?

2. Does the "arising under"-clause of Article III of the Constitution prevent Congress from granting district courts jurisdiction over a federal right of action intended to replace state remedies for the compensation of persons injured by nuclear power plant accidents, when Congress directs the courts to derive the rules of decision for that federal right of action from substantive state law to the extent not inconsistent with the federal compensation scheme?

3. May Congress constitutionally authorize removal to district court of public liability actions that were pending in state courts when Congress enacted the removal authority?

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Respondents General Public Utilities Corporation, *et al.*,[1] defendants in these public liability actions un-

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[1] Respondents are General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, U.E.& C.-Catalytic, Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc. The information required by Supreme Court Rule 29.1 regarding each of the Respondents is set forth in Respondents' Appendix at 39a-41a.

der the Atomic Energy Act, as amended by the Price-Anderson Act, and appellants in the court below, submit this brief in opposition to the petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in Petitioners' Appendix, the provisions of 42 U.S.C. §§ 2012-14 and 2210 are involved in this case and are set forth in their entirety in Respondents' Appendix at 1a-38a.

STATEMENT

A. The Present Litigation.

The present cases arise out of the March 28, 1979 accident at Unit 2 of the Three Mile Island nuclear generating station ("TMI"). This accident led to the first and to date the only major litigation under the financial protection provisions of the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (1957), which amended the Atomic Energy Act of 1954. Since the TMI accident, over 2000 plaintiffs have filed suit in over 200 actions in state and federal courts in Pennsylvania, Mississippi and New Jersey.

Most of the present cases are personal injury claims; some allege economic injuries such as loss of tourism revenues. A-38. In the Price-Anderson Amendments Act of 1988 (the "Amendments Act"), Congress, *inter alia*, provided a specific statutory basis for original and removal jurisdiction over cases arising out of nuclear incidents such as the one at TMI. Pub. L. 100-408 § 11(a), 102 Stat. 1076 (1988) (codified at 42

U.S.C. § 2210(n)(2)). Congress made the removal jurisdiction applicable to pending cases and, pursuant to and in conformance with the Amendments Act, the present cases were removed from state courts and consolidated in the United States District Court for the Middle District of Pennsylvania. A-146.

The district court held that it was without removal jurisdiction because the Amendments Act did not satisfy Art. III "arising under" jurisdiction. The Third Circuit reversed, and Petitioners did not seek rehearing or rehearing *en banc*.

B. The Public Liability Action Under The Atomic Energy Act, As Amended By The Price-Anderson Act.

Although the Art. III question Petitioners present would require consideration of the federal ingredients in a congressionally defined cause of action, the "public liability action," the Petition contains no description of the comprehensive and unique regulatory scheme of which that private right of action is a part.

In 1954, with the passage of the Atomic Energy Act, Congress ended the legal monopoly of the federal government over production and use of nuclear fuels. Congress' purpose in doing so was "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes. . . ." 42 U.S.C. § 2013(d). But it quickly became apparent that private investment would not be forthcoming if there were no limits on potential liability. S. Rep. No. 296, 85th Cong., 1st Sess. 1, *reprinted in* 1957 U.S.C.C.A.N. 1803. The Price-Anderson Act was designed "to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing

the public compensation in the event of a catastrophic nuclear incident." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978); *see also id.* at 63-67.

Congress mandated that licensees of commercial nuclear power reactors be capable, through private insurance or by other financial means, of responding to claims for damages arising out of a nuclear incident, up to federally specified limits. 42 U.S.C. § 2210(b). "Nuclear incident" was defined to cover any injuries "arising from the special dangerous properties" that made nuclear risk a subject of federal regulation. S. Rep. No. 296, 85th Cong., 1st Sess. 16, *reprinted in* 1957 U.S.C.C.A.N. at 1817; *see* 42 U.S.C. § 2014(q).

Congress recognized that a nuclear incident might be caused by any of a number of participants in the nuclear industry. Congress did not want compensation to be hampered by the complications likely to ensue if multiple defendants, each with its own insurer, were actively defending. In a "significant departure from normal tort law precepts," H.R. Rep. 104, 100th Cong., 1st Sess., pt. 3, at 16 (1987), Congress, through mandatory indemnification provisions, channelled all public liability to licensees, and away from non-licensees who might otherwise have borne such liability under ordinary tort law. *See* 42 U.S.C. §§ 2014(t), 2014(w), 2210(a).[2] The channelling provisions alter the

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[2] Congress recognized that the channelling provisions would protect even a complete stranger to the industry who causes a nuclear incident, such as an errant pilot. *Governmental Indemnity and Reactor Safety: Hearings Before the Joint Comm. on Atomic Energy*, 85th Cong., 1st Sess. 20, 109, 114-15, 165 (1957).

(continued)

ordinary congruence in tort law between causing and bearing liability.[3]

If a nuclear incident caused damages in excess of the financial protection required of the licensee, the federal government indemnified anyone who was liable up to a specified limit. 42 U.S.C. § 2210(c). All public liability growing out of a single nuclear incident was capped at the total of the financial protection and the indemnification. 42 U.S.C. § 2210(e). The government's potential indemnification liability for TMI public liability is $85 million.

After passage of the Price-Anderson Act, Congress continued to refine the compensation provisions over a thirty year period. In 1966, dissatisfied with substantive state tort law, Congress authorized the Nuclear Regulatory Commission ("NRC") to require licensees to waive negligence and other defenses in the event of an extraordinary nuclear occurrence ("ENO"), and conferred federal jurisdiction over claims for public liability arising out of such an occurrence.[4] Congress also authorized federal courts to formulate an equitable distribution plan whenever the federally mandated funds may constitute a limited fund because the federal liability limits may be exceeded. 42 U.S.C. § 2210(*o*). In 1975, Congress mandated a second tier of private insurance, to be funded by deferred premiums paid by all licensees of nuclear

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See also S. Rep. No. 296, 85th Cong., 1st Sess. 17, *reprinted in* 1957 U.S.C.C.A.N. at 1818-19.

[3] All but one of the defendants in these cases are non-licensees.

[4] The NRC has determined that the TMI accident was not an ENO. *See Stibitz v. General Pub. Utils. Corp.*, 746 F.2d 993, 996 n.3 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

power reactors, if and when required. 42 U.S.C. § 2210(b). This retrospective premiums obligation constitutes a federally mandated industry-wide shared liability rule. Congress also committed itself to further compensation in the event damages exceeded the cap on public liability. 42 U.S.C. § 2210(e).

In 1988, in the Amendments Act, Congress addressed the problem of the nuclear incident that gives rise to multiple claims but is not an ENO. Congress adopted a national policy of uniform treatment for all persons injured in a single nuclear incident. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18 (1987) ("desire of Congress for equitable and uniform treatment of victims of a nuclear accident"); *see also* A-88, A-98 to A-99. The Amendments Act creates a federal cause of action, the "public liability action," which encompasses "any suit asserting public liability," 42 U.S.C. § 2014(hh);[5] confers original and removal jurisdiction for public liability actions arising out of a given nuclear incident on a single federal district court—the district court in the district where the nuclear incident occurred, 42 U.S.C. §§ 2014(hh), 2210(n)(2); and directs that the "substantive rules for decision" in public liability actions "shall be derived from the law of the State in which the nuclear incident involved occurs" unless the state law is "inconsistent" with the compensation provisions of the Act. 42 U.S.C. § 2014(hh).

In the Amendments Act, Congress also enacted special case management and consolidation authorities

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[5] "Public liability" is separately defined as "*any* legal liability arising out of or resulting from a nuclear incident . . . ." 42 U.S.C. § 2014(w) (emphasis added).

for the federal district court, and authorized the adoption of special procedural rules to expedite cases or to allow more equitable consideration of claims. 42 U.S.C. § 2210(n)(3).[6]

C. The Three Decisions Prior To The 1988 Amendments.

The TMI litigation gave rise to three Third Circuit decisions prior to the Amendments Act, when Congress had not yet obviated application of the statutory "well-pleaded complaint" requirement under 28 U.S.C. § 1331.[7] None of the three cases addressed any constitutional issue under Art. III, and none was reviewed by this Court.

D. The Decision Below.

The district court found Art. III "arising under" jurisdiction lacking because Congress had not codified the substantive standards of liability for public liability actions. A-152. The district court stayed its remand order, however, and certified the Art. III question via 28 U.S.C. § 1292(b).

The Third Circuit entertained the Section 1292(b) appeal and reversed the district court's constitutional

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[6] Contrary to the impression left by the Petition that only the Respondents went before Congress to seek the Amendments Act, (*see* Pet. 5-6, 12), the "decision to expand the jurisdictional grant was based upon [testimony by] '[a]ttorneys representing *both plaintiffs and defendants* in the TMI litigation . . . that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants . . . .' " A-79 n.18 (quoting S. Rep. No. 218, 100th Cong., 2d Sess. 13 (1988)) (emphasis added).

[7] *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986); *Stibitz*, 746 F.2d 993; and *Pennsylvania v. General Pub. Utils.* Co., 710 F.2d 117 (3d Cir. 1983).

determination. The court first addressed whether the district court's decision to remand was reviewable at all, in view of the bar on review of remand orders in 28 U.S.C. § 1447(d). Following this Court's decision in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976), the court analyzed whether the district court's decision rested upon the ground specified in 28 U.S.C. § 1447(c), "lack[] [of] subject matter jurisdiction." Here, the district court's remand rested "*solely* on its determination that Congress exceeded its constitutional authority" when it made the grant. A-57 (emphasis in original). Such a constitutional determination, the court found unanimously, "was not the type of federal subject matter jurisdictional decision intended to be governed" by Section 1447(d). A-58. The court declined to attribute to Congress an intent to make federal district courts the "final arbiters of the constitutionality" of federal jurisdictional statutes. A-61; *see also* A-66.[8]

The opinion for the court begins its examination of the Art. III question with the "central teaching" of *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), reiterated and applied in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), and *Mesa v. California*, 489 U.S. 121 (1989), that a statute does not come within the Art. III "arising under" jurisdiction if it is "nothing more than a jurisdictional grant." A-70; *see also id.* at A-70 to A-75. In the

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[8] Thus, contrary to the "floodgates" assertions in the Petition, the Court of Appeals did not create an exception from 28 U.S.C. § 1447(d) for any case certified under 28 U.S.C. § 1292(b), or for any case involving any kind of constitutional issue. Rather, the Court of Appeals carefully constricted its limiting interpretation of § 1447(d). *See* Argument section I, *infra*.

Amendments Act, Congress did more than confer jurisdiction: "Congress intended to—and did—create a federal cause of action which will implicate substantive aspects of federal law." A-82. "At the threshold of every action asserting liability growing out of a nuclear incident . . . is a federal definitional matter to be resolved: Is this a public liability action?" A-83. A claim growing out of a "nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* (emphasis in original). "[N]o state cause of action based upon public liability" any longer exists. *Id.*

Relying on text and legislative history, the court found that in a public liability action, "state law provides the content of and operates as federal law." A-85. Nothing in the case law supports the proposition that "Congress may not constitutionally rely upon state rules of decision as a foundation for a particular statutory scheme." A-83.

In the alternative, even if "it is state law itself, rather than state law operating as federal law, which forms the basis for decision in public liability actions" (A-87), the "federal elements involved in the Price-Anderson scheme are . . . sufficient" to satisfy Art. III. A-88. "Congress has placed an overlay of federal law upon the rights and remedies previously available under state law." A-91. The federal overlay is in various provisions of the compensation scheme of the Price-Anderson Act (*see id.*), and in the pervasive safety regulation of nuclear activities under the Atomic Energy Act. Given the preemption of the field of nuclear safety regulation found by this Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212

(1983), the duty of care owed by defendants to plaintiffs in public liability cases is "dictated" by federal safety regulations. A-91, A-95 to A-96. "[I]mportant federal questions" are "indispensable ingredients of the public liability action." A-96.[9]

As did the majority, the concurring opinion sustains the statute without reliance on any theory of "protective jurisdiction." A-96 n.23, A-102 (concurring opinion). A jurisdictional grant "must rest on more than a belief that a federal forum would be fairer or more efficient." A-137.

The concurrence upholds the statute under a constitutional standard explicitly designed to avoid the broadest implications of *Osborn*, under which the mere possibility of federal issues arising might suffice. *See* A-117 to A-118. The concurring opinion examines (a) the "likelihood that substantive federal issues will arise in a particular class of cases," A-117; and (b) whether original jurisdiction, as against removal or appellate jurisdiction, is important to the accomplishment of Congress' substantive purposes. A-117 to A-118, A-137. Applying that test, the concurrence concluded that "the rationale for permitting original federal jurisdiction is at least as strong here as it was in *Verlinden*." A-138.

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[9] The concurrence recognized that federal safety regulations "will play an integral role in a large proportion" of public liability actions. A-123. The court below did not address the extent to which the federal "overlay" may affect other elements of the cause of action, such as whether strict liability applies; proximate cause; the measure of damages for the types of injuries enumerated in the definition of "nuclear incident;" affirmative defenses; the duty to mitigate; and burdens of proof.

Having sustained the constitutionality of the jurisdictional grant, the majority and concurrence agreed that the Amendments Act's "provision for retroactivity was rationally directed to a legitimate federal concern." A-99, A-100 (concurring opinion).

REASONS FOR DENYING THE WRIT

I. THE REVIEWABILITY ISSUE DOES NOT WARRANT REVIEW.

As the court of appeals observed, the 1447(d) issue in this case is "unique. No case interpreting the reach of section 1447(d) has addressed the particular constitutional dilemma presented here." A-53. Congress enacted the predecessor to Section 1447(d) over a century ago, in 1887. Petitioners cite no case, and Respondents have found none, presenting the question presented here—whether Section 1447(d) bars all review where a district court remands because it finds the statute granting it jurisdiction to be unconstitutional under Art. III. "Never before," as Petitioners themselves observe, has an Art. III issue been presented to this Court in "the procedural posture presented by this case." Pet. 2.

There is no reason to believe that this novel issue of reviewability under Section 1447(d) will recur with any frequency in the future. For this 1447(d) issue to arise, (a) a case must come to the district court by way of removal, (b) the district court must determine that an express statutory grant of jurisdiction is unconstitutional under Art. III, which is itself a very rare occurrence, and (c) the Art. III determination must be the sole ground for remand (as was

the case here, A-57).[10] It is not surprising that this issue of reviewability has never before arisen, and indisputable that it is unlikely to arise with any frequency in the future. Despite Petitioners' alarm, the careful resolution by the court below of this narrow and unprecedented issue has not "rendered meaningless the appellate review prohibition of § 1447(d)." Pet. 8.[11]

As the issue has not arisen before, there is no conflict between the decision below and any decision of this Court or of any other circuit. In particular, and contrary to the Petitioners' assertion (Pet. 9, 11), there is no conflict with this Court's decision in *Thermtron*, 423 U.S. 336. The remand order in *Thermtron* was not based on a constitutional ground, and the Court in fact reviewed (and reversed) the remand order. *See* 423 U.S. at 343-44, 351. Similarly,

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[10] If there is an independent and sufficient non-Art. III ground for a remand, a court of appeals would not review any Art. III issue even in the rare case where such an issue is present. Occasionally, district courts do remand upon grounds not enumerated in § 1447(c), for example, contractual waivers of the right to remand, or procedural defects not contemplated by that section. Such remands have been held to be reviewable. *See* A-49 to A-53.

[11] Petitioners make a far-fetched prediction that confusion over when a remand order presents a question of "constitutional proportion" could cause "countless appeals" and delay "thousands of cases." Pet. 11. In the extremely rare case where a remand order purports to rest upon an Art. III determination about a jurisdictional statute, that fact will be evident. If the remand order does not purport to rest upon an Art. III determination, the decision below will have no bearing. Contrary to the loose description in the Petition (at 3, 11), the holding below has nothing to do with questions of "constitutional proportion" not involving application of Art. III to a jurisdictional statute.

Petitioners' assertion of conflict with other circuits is inaccurate. None of the three cases cited by Petitioners involved a remand based on a determination by the district court that the grant of jurisdiction was unconstitutional.[12]

The court's resolution of the 1447(d) issue was the correct one. In *Thermtron*, this Court found that Congress did not intend "to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron*, 423 U.S. at 351. It is at least equally unlikely that Congress conferred carte blanche authority on district courts to "revise" removal statutes by striking them down as unconstitutional.[13] Petitioners'

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[12] *See* Pet. 10-11, citing *Federal Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.*, 857 F.2d 665 (9th Cir. 1988); *Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211 (5th Cir.) (per curiam), *cert. denied*, 484 U.S. 824 (1987); and *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959). The Petition cites *Richards* as recognizing that review is precluded even where constitutional determinations are made by the district court. Pet. 10. But the reference to "constitutional infirmities" in that case was dictum in a two paragraph per curiam order, and says nothing about how the Fifth Circuit would have decided this case. That the courts of appeals in *Frumenti* and *Bear River* declined to review questions that had been certified under § 1292(b) does not place those cases in conflict with the decision here. Petitioners are simply wrong in asserting that the decision below categorically "except[ed] interlocutory review" from § 1447(d). *See* Pet. 8. The dispositive element here was that the district court's decision to remand rested upon its determination that the statute granting jurisdiction was itself unconstitutional.

[13] Petitioners attempt to draw support from the repeal of 28

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interpretation can be sustained only through the "woode[n]" reading that this Court explicitly rejected in *Thermtron*, 423 U.S. at 352.[14]

II. THE ART. III ISSUE DOES NOT WARRANT REVIEW.

A. The Decision Below Applied Traditional Principles To A Distinctive Federal Statute; It Is Not In Conflict With Any Other Decision.

This case involves the application of Art. III to a highly particularized federal statute. The Petition does not contain even a suggestion of conflict among lower courts concerning the Art. III issue, and there is in fact no conflict. Apart from the decision below, three lower court decisions have addressed the jurisdiction of district courts over cases arising out of nuclear incidents. Two were decided in the Third Circuit, prior

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U.S.C. § 1252 (Pet. 10), but that statute, which authorized direct appeal to this Court of lower court decisions holding acts of Congress unconstitutional where the United States was a party, is irrelevant to the reviewability issue here. Indeed, in repealing, Congress affirmed the importance of "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress" through discretionary review. H.R. Rep. No. 660, 100th Cong., 2d Sess. 10 n.24, *reprinted in* 1988 U.S.C.C.A.N. 766, 776 n.24.

[14] Petitioners miss the point of the holding below (and of the reasoning in *Thermtron*) when they argue that because Congress has in various other statutes created exceptions to the bar in § 1447(d), no review should have been available here. Pet. 9 n.3. Since this remand was not within the statutory bar, no statutory exception to the bar was necessary. *See* A-67 n.10. Moreover, the argument makes sense only if Congress is held to assume that its acts are likely to be deemed unconstitutional, thus requiring provision for this likelihood. The presumption is, of course, the opposite. Acts of Congress are presumed to be constitutional.

to the Amendments Act, under the general federal question statute, 28 U.S.C. § 1331.[15] Neither addressed Art. III. The third was a more recent decision by a district court which upheld the constitutionality of the Amendments Act. *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448 (C.D. Ill. 1991).[16]

The decision below is not in conflict with any decision of this Court, nor does it apply any new Art. III "arising under" principles. Both the majority and the concurrence declined to rely on any theory of "protective jurisdiction." The majority's analysis "depends entirely" (A-75) upon an application of the "central teaching" of *Osborn*, "clarified" in *Verlinden* (A-70) and recently "reiterated" in *Mesa* (A-72), that "a case cannot be said to arise under a federal statute . . . that . . . is nothing more than a jurisdictional grant." A-70. The concurrence develops a two-step analysis explicitly designed to limit, rather than extend, the broadest implications of the *Osborn* decision. A-117 to A-119.

Applying *Osborn* and *Verlinden*, the majority's analysis turns on its determinations concerning the sta-

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[15] *Kiick*, 784 F.2d 490; *Stibitz*, 746 F.2d 993. It is noteworthy that in *Stibitz*, in the context of its ruling on the application of the well-pleaded complaint rule prior to the Amendments Act, the Third Circuit recognized that federal questions may well arise in the course of public liability litigation. 746 F.2d at 996.

[16] The district court in *O'Conner* reasoned that "under certain circumstances . . . Congress has the power to incorporate state law as federal law so that state law is essentially federalized." 770 F. Supp. at 452. Further, "even if the state rules of decision which are incorporated in 'public liability actions' . . . would not be regarded as federal law . . . Article III nonetheless authorizes federal jurisdiction given the extensive federal questions inherent in cases litigated under this Act." *Id.*

tutory scheme of which the jurisdictional grant is only a small part. The majority finds, for example, that injuries arising from "nuclear incidents" are compensable via the federal public liability action or not at all (A-83); at the "threshold" of every such action is a "federal definitional matter" (*id.*); Congress intended that the rules of decision derived from state law "constitute federal law" (A-87); even if Congress did not intend that state law operate as federal law, Congress effectuated its purposes by creating an "overlay of federal law" which alters a number of "rights and remedies previously available under state law" (A-91); in particular, "the duty the defendants owe the plaintiffs in tort is dictated by federal law." *Id.*[17] Given the court's statutory conclusion that "there are important federal questions to be resolved which are indispensable ingredients of the public liability action" (A-96), the court was hardly breaking new constitutional ground in holding that Congress did not exceed its constitutional authority when it conferred federal jurisdiction over public liability actions. Petitioners' real quarrel is thus not with the Art. III determination below, but with the court's conclusions regarding the operation and effect of the underlying Price-Anderson Act. These conclusions, of course, are specific to the Price-Anderson Act, and do not warrant certiorari review.

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[17] For example, pursuant to authority extended by Congress to the NRC and transferred to the Environmental Protection Agency, *see* 39 Fed. Reg. 24,936 (1973), the EPA promulgates regulations controlling permissible radiation exposures to persons off-site from operations at a licensed reactor. *See* 40 C.F.R. § 190.10. On-site exposures, which may also give rise to a public liability claim, are subject to the permissible dose limits set by the NRC. *See* 10 C.F.R. § 20.

B. The Court Of Appeals Correctly Decided The Art. III Issue.

Petitioners' contention that this case tests the "limits" of Art. III (Pet. 12) rests on two inaccurate assertions about the Amendments Act: that Congress did nothing more to satisfy Art. III than enact an "incantation of the magical words—'arising under' " (*id.* at 13) and that Congress did "nothing more than . . . attempt to adopt state law as federal law." *Id.* Both of these assertions ignore the statute and the extensive statutory analysis by the court below. Petitioners never do address the constitutionality of the statute that Congress actually enacted.

Petitioners' argument further proceeds in part from the irrelevant proposition that, prior to the Amendments Act, their claims had been determined by *Stibitz* and *Kiick* to be "state law claims." But neither *Stibitz* nor *Kiick* addressed the nature of Petitioners' claims in the context of the Amendments Act. Rather, both decisions were based on the well-pleaded complaint rule and its application to the determination that federal question jurisdiction was lacking under 28 U.S.C. § 1331.

Moreover, while the Petition asserts that there must be some "federal ingredient in the Petitioners' claims" (Pet. 12), *Mesa v. California* instructs that that premise is faulty. *Mesa* holds that constitutional "arising under" jurisdiction exists over state tort claims if a colorable federal defense is presented. 489 U.S. at 136-37. *See also Osborn*, 22 U.S. at 822.

Petitioners insist that the Amendments Act is a "mere jurisdictional grant" and therefore "constitutionally deficient." Pet. 12. In enacting a purely ju-

risdictional statute, however, Congress does "not intend to exercise its power to regulate commerce; nor to derive its authority from that article of the Constitution." *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452 (1852). Instead, Congress relies solely upon its authority to constitute inferior federal courts. *Id.* at 451.

When Congress enacted the Price-Anderson Act, which the Amendments Act amends, it expressly exercised Art. I powers other than its power to constitute inferior federal courts. *See* 42 U.S.C. §§ 2012, 2013(d); S. Rep. No. 296, 85th Cong., 1st Sess. 15, *reprinted in* 1957 U.S.C.C.A.N. at 1816. "The liability-limitation provision [is] a classic example of an economic regulation . . . ." *Duke Power*, 438 U.S. at 83. Congress' exercise of substantive Art. I powers supports Art. III "arising under" jurisdiction. *Verlinden*, 461 U.S. at 496 ("Congress expressly exercised its power to regulate foreign commerce").

Moreover, unlike the statute in *Propeller Genesee*, Congress did not simply say that federal courts have jurisdiction over torts arising out of nuclear incidents. Rather, "the jurisdictional provisions of the Act are simply one part of [a] comprehensive scheme," *Verlinden*, 461 U.S. at 496, in this case a federal scheme of compensation and safety regulation. Under this comprehensive scheme, there is more than a "mere speculative possibility that a federal question may arise at some point in the proceeding." *Id.* at 493.

By statute, the starting point of any public liability action must be the federal statutory question, is this case one claiming compensation for "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of

or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." (Definition of "nuclear incident" at 42 U.S.C. § 2014(q)). If not, then the action is not a "public liability action" and no part of the Price-Anderson Act, including its jurisdictional provisions, applies. Plaintiff has his ordinary state tort remedies which he may pursue in the ordinary way.

But if the action is one seeking compensation as a result of a "nuclear incident" as defined (i.e., as a result of the nuclear risk which was the subject of Congress' concern), then it is a "public liability action." *See* 42 U.S.C. §§ 2014(w), 2014(hh). From that determination flow a number of consequences having far more than mere jurisdictional significance. These non-jurisdictional consequences follow whether the public liability action is in federal or state court.

First among these is that any judgment, state or federal, will be satisfied from the funds in the mandated financial protection system, rather than from the assets of individual defendants, and total public liability is subject to a federal ceiling. These provisions remove the risks characteristic of ordinary tort law that a plaintiff will be unable to recover on a judgment, and that a defendant will sustain a bankrupting liability. Second, whether the suit is in federal or state court, licensees bear the financial responsibility for "public liability," even if they are not the cause of the injury, and non-licensees may not be held financially responsible, even if they are the cause. *Cf. Verlinden*, 461 U.S. at 496-97 (the Foreign Sovereign Immunities Act "governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state"). The deter-

rence role of ordinary tort law is thus altered. Indeed, liability that reaches the second tier of financial protection, funded by the retrospective premiums, would be borne by all federal licensees. The retrospective premiums provisions thus create an industry-wide shared liability rule.

Furthermore, given the dual investment and compensation objectives of the Price-Anderson Act, a plaintiff may not simply choose to "waive" the federal compensation scheme and pursue his traditional state law remedies. One of the principal purposes of the Price-Anderson Act was to remove the disincentive to participation in the nuclear power program identified when the Act was initially adopted. In order to achieve that purpose, Congress made the decision to insulate the assets of those participating in the industry from tort suits, and to replace that source of funds with the "financial protection system" of the Act. *See* pp. 3-5, *supra*.[18]

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[18] Because the public liability action is the exclusive means by which someone injured as a result of a nuclear incident may obtain compensation, it makes no difference whether the plaintiff invokes the Act or ignores it. A plaintiff whose injury is alleged to have resulted from the nuclear risk may not "waive" his federal action and pursue state law recovery, since to do so would frustrate the aspect of the Price-Anderson Act which protects private participants in the nuclear power industry. Similarly, a plaintiff may not have access to the federally-created financial protection system unless his injury is alleged to have resulted from the nuclear risk. A plaintiff alleging that he dropped a heavy fuel rod on his foot, breaking a bone, would not have access to the financial protection funds; a plaintiff alleging a cancer from exposure to radiation from that same fuel rod would not be able to obtain and execute upon a state or federal court judgment apart from the financial protection system.

In terms of Article III jurisprudence, then, whether or not a plaintiff's complaint precipitates operation of the "financial protection system" will "for[m] an original ingredient in every cause." *Osborn*, 22 U.S. at 824; *see also* A-83. The provisions of the Price-Anderson Act do not "merely concern access to the federal courts." *Verlinden*, 461 U.S. at 496. They will always determine who pays, and they may determine whether anyone pays.[19] They will determine which claims are governed by state law rules, and which are governed by federal rules of decision "derived from" state rules not "inconsistent" with the federal compensation scheme. They will determine which claims are subject to the cap on liability, whether non-licensees are protected by the channelling provisions, and whether the retrospective premium provisions will apply. Congress may "secure . . . a trial in the federal courts," *Osborn*, 22 U.S. at 822, for persons whose liability Congress has imposed, capped, or channeled entirely to others.

Apart from the structural changes effected by the Act, resolution of the question of due care in public liability actions will almost certainly involve the application of federal safety regulations, whether be-

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[19] For example, an action barred by the statute of limitations of the incident-state might be barred completely, even if the statute of limitations to be applied would otherwise have been that of the state in which the action had been commenced. *Cf. Bonner v. Chevron U.S.A.*, 668 F.2d 817 (5th Cir. 1982). The "precautionary evacuation" (*see* 42 U.S.C. § 2014(gg)) creates a remedy unknown at common law (the essence of a "public nuisance" at common law is that the general public cannot recover for it). The omnibus insurance and indemnity will eliminate contribution and indemnity claims which often dominate other "toxic tort" litigations. *See also* n.22, *infra*.

cause of preemption, as the majority below believed (*see* A-91 to A-96), or because the state law is found to incorporate the federal standard, as two district courts have found,[20] or because the federal standard is considered evidence of due care.

Additional federal ingredients will necessarily be present in every public liability action, because Section 2014(hh) requires that the court hearing that action "derive" the "substantive rules for decision" from the law of the state where the nuclear incident occurred, unless such state law is "inconsistent" with provisions of the federal scheme. Thus, in applying this federal statute, the trial court must first determine what rules of decision are "substantive" within the meaning of the statute. That is a federal question.[21] Having made that decision, the court must then compare the substantive rules of decision of the in-

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[20] *See Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625 (N.D. Ill. 1991); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495, 501 (N.D. Ill. 1991); *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 678 (C.D. Ill. 1990).

[21] It is doubtful that the body of law following *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), will provide a ready source of answers. The policies and purposes of the Price-Anderson Act are not those of *Erie* and the Rules of Decision Act. For example, the proper conflict-of-laws rule will be the one that best effectuates Congress' intent in the Price-Anderson Act. *Compare* the concurrence below, A-104 (Amendments Act requires court "to apply the law of the state where the nuclear incident occurred, even if state law would otherwise look to the law of some other state") *with Richards v. United States*, 369 U.S. 1, 7, 10 (1962) (under Federal Tort Claims Act: conflict-of-law rule of the state where negligent act occurred) *and with Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (under Rules of Decision Act: conflict-of-law rule of forum state).

cident state with the compensation provisions of the Price-Anderson Act, to determine whether there is any inconsistency. That is also a federal question.[22] As such, these questions must be decided in light of the text, structure and purpose of the Price-Anderson Act, in its larger context as part of the Atomic Energy Act.

Finally, under Congress' decision to "derive" rules of decision from the law of the incident-state (which in and of itself leaves considerable room for the exercise of judgment by the court), state law applies in a public liability action only because Congress adopted it as federal law. As the court below found, "Congress intended that the rules of decision constitute federal law." A-87; *see also* A-85 to A-87.[23]

When Congress determines that the content of rules of decision needed to fill out its program are to be derived from state law, as it did in the Amendments

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[22] The possible areas in which the question of inconsistency may arise are manifold. For example, should claims for loss of consortium, assuming state law permits them, be compensable under the Act's definition of "bodily injury, sickness, disease, or death;" should claims for increased risk of future injury be presently compensable, which the laws of some states permit, when the federal compensation scheme expressly directs that funds be held in reserve for "possible latent injury claims which may not be discovered until a later time," 42 U.S.C. § 2210(*o*)(1)(C), and provides a discovery rule for limitations of actions. *Id.* § 2210(n)(1). *See also* n.19, *supra.*

[23] Congress modelled the "derived from" provision in the Amendments Act on the Outer Continental Shelf Lands Act. *See* H.R. Rep. 104, 100th Cong., 1st Sess., pt. 1, at 18 (1987). This Court has not questioned Art. III "arising under" jurisdiction under that Act. *See Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969); *see also* A-86 to A-87.

Act, it is exercising its legislative authority to regulate under Art. I. It makes a "basic legislative decision . . . to conform the [federal] laws . . . to the local laws . . . ." *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (rejecting delegation attack on Federal Assimilative Crimes Act).[24]

There are good reasons why Congress made such a choice in the Amendments Act. A principal purpose of Congress was to secure the efficient determination of public liability actions. To secure those goals, it made perfect sense for Congress to refer to well developed state law tort rules with which both counsel and the courts would already be familiar. It is not because of congressional default or indifference that state law found not to be "inconsistent" was selected to provide the content of the federal rules of decision. The incorporation of state rules into the larger federal matrix of Congress' program was an affirmative choice to serve an identified federal goal.

Contrary to Petitioners' assertion (Pet. 13), what is involved here is not the general question whether, because an adoptive statute is a legislative act of Congress under Art. I, it is *without more* a law of the United States under Art. III. For here, as in *Verlinden*, there is more.[25] As already described, Con-

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[24] The statement in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), quoted by Petitioners (Pet. 14) was with reference to the federal question statute, not Art. III. *See* 177 U.S. at 506 ("The question . . . is not one of the power of Congress, but of its intent.").

[25] Because *Verlinden* found that specific federal questions were necessarily involved in suits under the Foreign Sovereign Immunities Act, it did not reach the question whether the adoptive provisions of that Act would separately satisfy Art. III. *See* 461 U.S. at 495 n.22.

gress has occupied the field of nuclear safety regulation, and altered the opportunity for recovery and the incidence of liability through the compensation scheme.

Moreover, in the Amendments Act, Congress decided upon a national policy of uniform treatment for all persons injured in the same nuclear incident. To achieve this policy, Congress chose not simply a federal forum but a single forum, by conferring venue only in the district court in the district where the incident occurred. Uniformity would in fact be unlikely if multiple courts were deriving federal rules of decision by separately determining what elements in the law of the incident-state were "substantive" and not "inconsistent" with the Price-Anderson Act; separately identifying or attempting to predict state law as to those elements; and otherwise making myriad rulings in the course of multiple, separately conducted litigations. "With the federal jurisdiction and removal provisions . . . Congress ensured that all claims resulting from a given nuclear incident would be governed by the same law . . ." A-88; *see also* A-98 to A-99. The combination of jurisdiction and venue provisions is necessary to realize the substantive federal policy of uniformity.[26]

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[26] The Petition is not correct when it asserts that "Congress's interest in uniformity is belied by its grant of concurrent rather than exclusive jurisdiction." Pet. 15 n.5. That there is concurrent jurisdiction does not reduce the importance of the policy of uniformity. *See Verlinden*, 461 U.S. at 497 (under statute that, like the Amendments Act, retained concurrent jurisdiction, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting

(continued)

It is in the context of these substantive federal purposes that Congress authorized courts to "derive" a federal rule of decision from state law. This is not an adoptive statute without more. Congress' express, deliberate adoption of state law as federal law in the Amendments Act satisfies the requirement of Art. III "arising under" jurisdiction that a case arise under federal law. There is no novel or difficult Art. III question requiring review by this Court.

III. THE RETROACTIVITY ISSUE DOES NOT WARRANT REVIEW.

The court below observed that Petitioners' argument concerning the retroactive application of the jurisdictional grant was "skeletal," (A-96), and the Petition here fails to show any reason why this Court should review the question. In upholding the retroactive feature of the Amendments Act, the court below applied standard principles, and made, as those principles require, a determination that is highly specific to this statute. The decision below is not in conflict with a decision in any other circuit. *See* A-99.[27]

Petitioners assert that the decision below is contrary to this Court's decisions in two cases, each of

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results . . ."). Congress could reasonably expect that when multiple public liability actions arising out of the same incident are brought in multiple courts, the defendant (or the NRC) could ordinarily be counted on to remove to the designated federal court, thereby avoiding the risks and burdens of litigation in multiple courts. By contrast, no one plaintiff has an interest in uniformity as such.

[27] The issue of retroactive application of the removal provision cannot arise with frequency in the future, because, other than the instant cases, there are only a limited number of pending public liability actions that were filed before the Amendments Act.

which, however, *upheld* retroactive applications of federal statutes. *Chicago & N.W. Ry. v. Whitton*, 80 U.S. (13 Wall.) 270 (1872), affirmed retroactive application of a removal statute. And the court below applied the test stated in the more recent case, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), namely, whether the retroactive application "is supported by a legitimate legislative purpose furthered by rational means." A-97 to A-98 (quoting 467 U.S. at 729). The court found that test satisfied here, in view of Congress' purposes to promote uniform and equitable treatment of victims and the orderly distribution of funds. A-98 to A-99.

Finally, Petitioners assert that the Amendments Act "may" violate the separation of powers by "directing the federal courts to find that a federal cause of action arising under the constitution exists in these cases." Pet. 15 n.6. But the Amendments Act states only that public liability actions arise under Section 2210, the compensation provisions of the Act. 42 U.S.C. § 2014(hh). Congress did not seek in any way to limit judicial authority to decide the constitutionality of its jurisdictional grant or the outcome of any public liability action. Therefore, the Amendments Act does not present separation of powers concerns.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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Dated: January 10, 1992

APPENDIX

§ 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub. L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub. L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

§ 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable

and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the

Secretary of Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

(*l*) The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(m) The term "indemnitor" means (1) any insurer with respect to his obligations under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, with respect to any obligation undertaken by it in indemnity agreement entered into pursuant to section 2210 of this title.

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or

treaty is in full force and effect, but does not include any agreement for cooperation.

(*o*) The term "Joint Committee" means the Joint Committee on Atomic Energy.

(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(*l*) of this title, it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this chapter, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(u) The term "produce", when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to

be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(w) The term "public liability"means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or

(3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(bb) The term "United States" when used in a geographical sense includes all territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(dd) The terms "high-level radioactive waste" and "spent nuclear fuel" have the meanings given such terms in section 10101 of this title.

(ee) The term "transuranic waste" means material contaminated with elements that have an atomic number greater than 92, including neptunium, plutonium, americium, and curium, and that are in concentrations greater than 10 nanocuries per gram, or in such other concentrations as the Nuclear Regulatory Commission may prescribe to protect the public health and safety.

(ff) The term "nuclear waste activities", as used in section 2210 of this title, means activities subject to an agreement of indemnification under subsection (d) of such section, that the Secretary of Energy is authorized to undertake, under this chapter or any other law, involving the storage, handling, transportation, treatment, or disposal of, or research and development on, spent nuclear fuel, high-level radioactive waste, or transuranic waste, including (but not limited to) activities authorized to be carried out under the Waste Isolation Pilot Project under section 213 of Public Law 96-164 (93 Stat. 1265).

(gg) The term "'precautionary evacuation" means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is—

> (1) the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes an evacuation; and

(2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

(jj) [1] LEGAL COSTS.—As used in section 2210 of this title, the term "legal costs" means the costs incurred by a plaintiff or a defendant in initiating, prosecuting, investigating, settling, or defending claims or suits for damage arising under such section.

§ 2210. Indemnification and limitation of liability

(a) Requirement of financial protection for licensees

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further

[1] So in original. There is no subsec. (ii).

condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

(b) Amount and type of financial protection for licensees

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (A) the cost and terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (C) the nature and purpose of the licensed activity: *Provided,* That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major

part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided,* That such insurance is available to, and required of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further,* That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan shall not be more than $63,000,000 (subject to adjustment for inflation under subsection (t) of this section), but not more than $10,000,000 in any 1 year, for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further,* That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (*o*)(1)(D) of this section, payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

(2)(A) The Commission may, on a case by case basis, assess annual deferred premium amounts less than the standard annual deferred premium amount assessed under paragraph (1)—

(i) for any facility, if more than one nuclear incident occurs in any one calendar year; or

(ii) for any licensee licensed to operate more than one facility, if the Commission determines that the financial impact of assessing the standard annual deferred premium amount under paragraph (1) would

result in undue financial hardship to such licensee or the ratepayers of such licensee.

(B) In the event that the Commission assesses a lesser annual deferred premium amount under subparagraph (A), the Commission shall require payment of the difference between the standard annual deferred premium assessment under paragraph (1) and any such lesser annual deferred premium assessment within a reasonable period of time, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the standard annual deferred premium assessment under paragraph (1) would become due.

(3) The Commission shall establish such requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection including without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(4)(A) In the event that the funds available to pay valid claims in any year are insufficient as a result of the lim-

itation on the amount of deferred premiums that may be required of a licensee in any year under paragraph (1) or (2), or the Commission is required to make reinsurance or guaranteed payments under paragraph (3), the Commission shall, in order to advance the necessary funds—

(i) request the Congress to appropriate sufficient funds to satisfy such payments; or

(ii) to the extent approved in appropriation Acts, issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(B) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), any funds appropriated under subparagraph (A)(i) shall be repaid to the general fund of the United States Treasury from amounts made available by standard deferred premium assessments, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the funds appropriated under such subparagraph are made available.

(C) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), redemption of obligations issued under subparagraph (A)(ii) shall be made by the Commission from amounts made available by standard deferred premium assessments. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury by taking into consideration the average market yield on outstanding marketable obligations to the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for

such purpose the Secretary of the Treasury may use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by the Secretary of the Treasury under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(c) Indemnification of licenses by Nuclear Regulatory Commission

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 2002, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and and settling claims and defending suits for damage: *Provided, however,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

(d) Indemnification of contractors by Department of Energy

(1)(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

(B)(i)(I) Beginning 60 days after August 20, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 [50 U.S.C. 1431 et seq.] entered into between August 1, 1987, and August 20, 1988.

(II) The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)(1) of this section to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b) of this section.

(2) In agreements of indemnification entered into under paragraph (1), the Secretary may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, to the full extent of the aggregate public liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3)(A) Notwithstanding paragraph (2), if the maximum amount of financial protection required of licensees under subsection (b) of this section is increased by the Commission, the amount of indemnity, together with any financial protection required of the contractor, shall at all times remain equal to or greater than the maximum amount of financial protection required of licensees under subsection (b) of this section.

(B) The amount of indemnity provided contractors under this subsection shall not, at any time, be reduced in the event that the maximum amount of financial protection required of licensees is reduced.

(C) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person, shall be deemed to be amended, on August 20, 1988, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection on August 20, 1988.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $100,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(e) Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (*o*)(1)(D) of this section, shall not exceed—

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) of this section (plus any surcharge assessed under subsection (*o*)(1)(E) of this section);

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d) of this section, the maximum amount of financial protection required under subsection (b) of this section or the amount of

indemnity and financial protection that may be required under paragraph (3) of subsection (d) of this section, whichever amount is more; and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section—

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection (i) of this section and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection (b) of this section, to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) of this section is applicable, such aggregate public liability shall not exceed the amount of $100,000,000, together with the amount of financial protection required of the contractor.

(f) Collection of fees by Nuclear Regulatory Commission

The Commission or the Secretary, as appropriate, is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be $30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 2133 of this title: *Provided,* That the Commission or the Secretary, as appropriate, is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above a level of $60,000,000. For facilities licensed under section 2134 of this title, and for construction permits under section 2235 of this title, the Commission is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 2134 of this title, taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility. For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than $100 per year.

(g) Use of services of private insurers

In administering the provisions of this section, the Commission or the Secretary, as appropriate, shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission or the Secretary, as appropriate, may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 5 of title 41 upon a showing by the Commission or the Secretary, as appropriate, that advertising is not reasonably practicable and advance payments may be made.

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(i) Compensation plans

(1) After any nuclear incident involving damages that are likely to exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, the Secretary or the Commisison,[3] as appropriate, shall—

(A) make a survey of the causes and extent of damage; and

(B) expeditiously submit a report setting forth the results of such survey to the Congress, to the Representatives of the affected districts, to the Senators of the affected States, and (except for information that will cause serious damage to the national defense

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[3] So in original. Probably should be "Commission,".

of the United States) to the public, to the parties involved, and to the courts.

(2) Not later than 90 days after any determination by a court, pursuant to subsection (*o*) of this section, that the public liability from a single nuclear incident may exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section the President shall submit to the Congress—

(A) an estimate of the aggregate dollar value of personal injuries and property damage that arises from the nuclear incident and exceeds the amount of aggregate public liability under subsection (e)(1) of this section;

(B) recommendations for additional sources of funds to pay claims exceeding the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, which recommendations shall consider a broad range of possible sources of funds (including possible revenue measures on the sector of the economy, or on any other class, to which such revenue measures might be applied);

(C) 1 or more compensation plans, that either individually or collectively shall provide for full and prompt compensation for all valid claims and contain a recommendation or recommendations as to the relief to be provided, including any recommendations that funds be allocated or set aside for the payment of claims that may arise as a result of latent injuries that may not be discovered until a later date; and

(D) any additional legislative authorities necessary to implement such compensation plan or plans.

(3)(A) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Con-

gress on the same day and to each House while it is in session.

(B) The provisions of paragraphs (4) through (6) shall apply with respect to consideration in the Senate of any compensation plan transmitted to the Senate pursuant to paragraph (2).

(4) No such compensation plan may be considered approved for purposes of subsection (e)(2) of this section unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is transmitted to the Senate, the Senate passes a resolution described in paragraph 6[4] of this subsection.

(5) For the purpose of paragraph (4) of this subsection—

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

(6)(A) This paragraph is enacted—

(i) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions described by subparagraph (B) and it supersedes other rules only to the extent that it is inconsistent therewith; and

(ii) with full recognition of the constitutional right of the Senate to change the rules at any time, in the

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[4] So in original. Probably should be "(6)".

same manner and to the same extent as in the case of any other rule of the Senate.

(B) For purposes of this paragraph, the term "resolution" means only a joint resolution of the Congress the matter after the resolving clause of which is as follows: "That the ___ approves the compensation plan numbered ___ submitted to the Congress on ___, 19___.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate.

(D)(i) If the committee of the Senate to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration with respect to such compensation plan which has been referred to the committee.

(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another

motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

(E)(i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(F)(i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate to the procedures relating to a resolution shall be decided without debate.

(j) Contracts in advance of appropriations

In administering the provisions of this section, the Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of title 31.

(k) Exemption from financial protection requirement for nonprofit educational institutions

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this title, for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a) of this section. With respect to licenses issued between August 30, 1954, and August 1, 2002, for which the Commission grants such exemption:

(1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production

or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

(*l*) Presidential commission on catastrophic nuclear accidents

(1) Not later than 90 days after August 20, 1988, the President shall establish a commission (in this subsection referred to as the "study commission") in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section.

(2)(A) The study commission shall consist of not less than 7 and not more than 11 members, who—

(i) shall be appointed by the President; and

(ii) shall be representative of a broad range of views and interests.

(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(D) Any vacancy in the study commission shall be filled in the manner in which the original appointment was made.

(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

(3) The study commission shall conduct a comprehensive study of appropriate means of fully compensating victims

of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section, and shall submit to the Congress a final report setting forth—

(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system;

(B) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(4)(A) The chairperson of the study commission may appoint and fix the compensation of a staff of such persons as may be necessary to discharge the responsibilities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and title 5.

(B) To the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

(C) The Attorney General, the Secretary of Health and Human Services, and the Director of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and

services, including staff, as may be necessary for the effective performance of the functions of the study commission.

(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice or assistance upon request by the chairperson of the study commission.

(E) Each member of the study commission may receive compensation at the maximum rate prescribed by the Federal Advisory Committee Act (5 U.S.C. App.) for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including per diem in lieu of subsistence under sections 5702 and 5703 of title 5.

(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the 2-year period beginning on August 20, 1988.

(6) The study commission shall terminate upon the expiration of the 2-month period beginning on the date on which the final report required in paragraph (3) is submitted.

(m) Coordinated procedures for prompt settlement of claims and emergency assistance

The Commission or the Secretary, as appropriate, is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public

liability. The Commission or the Secretary, as appropriate, and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission or the Secretary, as appropriate, shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

(n) Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section, or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance

policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28 or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

(i) a court, acting pursuant to subsection (*o*) of this section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount in the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel—

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

(*o*) Plan for distribution of funds

(1) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under the applicable limit of liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section:

(A) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(B) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with a plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (C); and

(C) The Commission or the Secretary, as appropriate, shall, and any other indemnitor or other interested person may, submit to such district court a plan

for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a later time and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission or the Secretary as appropriate, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(D) A court may authorize payment of only such legal costs as are permitted under paragraph (2) from the amount of financial protection required by subsection (b) of this section.

(E) If the sum of public liability claims and legal costs authorized under paragraph (2) arising from any nuclear incident exceeds the maximum amount of financial protection required under subsection (b) of this section, any licensee required to pay a standard deferred premium under subsection (b)(1) of this section shall, in addition to such deferred premium, be charged such an amount as is necessary to pay a pro rata

share of such claims and costs, but in no case more than 5 percent of the maximum amount of such standard deferred premium described in such subsection.

(2) A court may authorize the payment of legal costs under paragraph (1)(D) only if the person requesting such payment has—

(A) submitted to the court the amount of such payment requested; and

(B) demonstrated to the court—

(i) that such costs are reasonable and equitable; and

(ii) that such person has—

(I) litigated in good faith;

(II) avoided unnecessary duplication of effort with that of other parties similarly situated;

(III) not made frivolous claims or defenses; and

(IV) not attempted to unreasonably delay the prompt settlement or adjudication of such claims.

(p) Reports to Congress

(1) The Commission and the Secretary shall submit to the Congress by August 1, 1998, detailed reports concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

(2) Not later than April 1 of each year, the Commission and the Secretary shall each submit an annual report to the Congress setting forth the activities under this section during the preceding calendar year.

(q) Limitation on awarding of precautionary evacuation costs

No court may award costs of a precautionary evacuation unless such costs constitute a public liability.

(r) Limitation on liability of lessors

No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason or an interest as lessor of such production or utilization facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability.

(s) Limitation on punitive damages

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

(t) Inflation adjustment

(1) The Commission shall adjust the amount of the maximum standard deferred premium under subsection (b)(1) of this section not less than once during each 5-year period following August 20, 1988, in accordance with the aggregate percentage change in the Consumer Price Index since—

(A) August 20, 1988, in the case of the first adjustment under this subsection; or

(B) the previous adjustment under this subsection.

(2) For purposes of this subsection, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers published by the Secretary of Labor.

RESPONDENT'S RULE 29.1 STATEMENT

Respondent	Parent	Subsidiaries Not Wholly Owned
General Public Utilities Corp.	—	—
Jersey Central Power & Light Co.	General Public Utilities Corp.	Saxton Nuclear Experimental Corp.
Metropolitan Edison Co.	General Public Utilities Corp.	Saxton Nuclear Experimental Corp.
Pennsylvania Electric Co.	General Public Utilities Corp.	Saxton Nuclear Experimental Corp.
U.E.& C.-Catalytic, Inc.	United Engineers & Constructors International, Inc.	UME-SMAS Catalytic Servicios, S.A. Unico, S.A.

Respondent	Parent	Subsidiaries Not Wholly Owned
McDermott Incorporated	—	Arabian Petroleum Marine Construction Company
		B&W Special Projects, Inc.
		Babcock & Wilcox Idaho, Inc.
		Construcciones Maritimas Mexicanas, S.A. de C.V.
		Olin Pantex Inc.

Respondent	Parent	Subsidiaries Not Wholly Owned
Babcock & Wilcox Company	McDermott Incorporated	Abhasain Hudson Heat Transfer Co. Ltd.
		Babcock & Wilcox Services, Inc.
		Diamond Power Specialty Limited
		Especialidades Termonecanicas, S.A. dė C.V.
		KBW Gasification Systems, Inc.
		Powersafety International, Inc.
Burns & Roe Enterprises, Inc.	Roe Enterprises, Inc.	Burmot Australia PTY, Limited
		Lin & Roe Co., Ltd.
		BRINESA, SA
Dresser Industries, Inc.	—	—